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**National Indemnity Company and Bruce Richard Friedman.** Case 14–CA–182175

December 18, 2019

**DECISION AND ORDER**

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

On November 20, 2017, Administrative Law Judge Elizabeth M. Tafe issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions<sup>1</sup> only to the extent consistent with this Decision and Order.<sup>2</sup>

**I. BACKGROUND**

The Respondent is an insurance company headquartered in Omaha, Nebraska. It has maintained several rules requiring that employees preserve the confidentiality of certain information. Since at least 2015, the Respondent has maintained a Code of Business Conduct and Ethics (Code of Conduct). On January 1, 2016, the Respondent distributed this Code of Conduct to employees and placed it on its intranet. Paragraph 5 of the Code of Conduct states:

Covered Parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends.

<sup>1</sup> We have amended the judge’s conclusions of law consistent with our findings herein.

<sup>2</sup> In the absence of exceptions, we adopt the judge’s findings that the Respondent violated Sec. 8(a)(1) by maintaining its Confidentiality Agreement and accompanying memorandum known as the Wurster Memo. The Respondent has excepted to the judge’s order regarding these violations. For the reasons discussed herein, we shall modify the judge’s recommended Order mandating rescission of the Confidentiality Agreement. We shall also modify the recommended Order to conform to our findings and to the Board’s standard remedial language.

Since at least 2009, the Respondent has required employees to sign a Confidentiality Agreement. The Confidentiality Agreement restricted disclosure of several types of information the Respondent deemed confidential, including “personnel information.” The Respondent updated its Confidentiality Agreement on December 20, 2016, deleting “personnel information” from the categories of information deemed confidential. It also added language specifically informing employees that “nothing in this Confidentiality Agreement” prohibits them from discussing “wages, benefits, hours, or other terms and conditions of employment,” and further stating that “[e]mployees have the right to engage in or refrain from engaging in such activities to the extent protected by law.” The Respondent distributed the updated Confidentiality Agreement to its employees by email on December 20, 2016.

Finally, from July 21, 2009, to December 20, 2016, a memorandum signed by the Respondent’s president, Donald Wurster (the Wurster Memo), was distributed with the Confidentiality Agreement. The Wurster Memo emphasized the importance of preserving the confidentiality of confidential information the Respondent creates and information it receives from others, including “information relating to our employees” and “our employees’ proprietary or private information.” The Respondent stopped distributing the Wurster Memo when it began distributing its revised Confidentiality Agreement in December 2016, but it did not notify employees who had received the Memo that it was no longer operative.

The judge found all three of the policies above—paragraph 5 of the Code of Conduct, the Confidentiality Agreement, and the Wurster Memo—unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Subsequent to the judge’s decision, the Board overruled *Lutheran Heritage* in relevant part in *Boeing Co.*, 365 NLRB No. 154 (2017). The Respondent has excepted to the judge’s finding that the Code of Conduct was unlawful, arguing the Code was lawful under both *Lutheran Heritage* and *Boeing*. The Respondent does not except to the judge’s finding that the Confidentiality Agreement and Wurster Memo were unlawful, but it does argue that the judge erred in ordering rescission of those documents. In response, the General Counsel maintains the Code of Conduct violates the National Labor Relations Act (Act) under *Boeing* and argues that the judge’s order to rescind the Confidentiality Agreement and Wurster Memo is necessary to effectuate the remedial purposes of the Act.

For the reasons set forth below, we find that the Code of Conduct is lawful under a *Boeing* analysis. We also agree with the Respondent that a remedial order to re-

scind the Confidentiality Agreement is unnecessary, but a rescission order for the Wurster Memo is necessary.

## II. ANALYSIS

### A. Legal Standard

In *Boeing*, the Board held that “when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Boeing*, above, slip op. at 3 (emphasis in original). In conducting this evaluation, the Board will strike the proper balance between the asserted business justifications and the invasion of employees’ rights in light of the Act and its policies, focusing on the perspective of the employees. *Id.* “As the result of this balancing . . . the Board will delineate three categories” of work rules:

*Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .

*Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

*Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

*Id.*, slip op. at 3–4 (emphasis in original).<sup>3</sup> However, these categories “will represent a classification of *results* from the Board’s application of the new test. The categories are not part of the test itself.” *Boeing*, above, slip op. at 4 (emphasis in original).

<sup>3</sup> We note that in *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 fn. 2 (2019), the Board recently redesignated the subdivisions of *Boeing* Category 1 as (a) and (b).

### B. Respondent’s Code of Business Conduct and Ethics

As noted above, the paragraph of the Respondent’s Code of Conduct alleged to be unlawful requires employees to “maintain the confidentiality of confidential information entrusted to them,” specifically including “all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed” and “information that suppliers and customers have entrusted to the Company.” The judge conceded that the Code of Conduct did not specifically designate as confidential terms and conditions of employment or, more generally, employee information. Nevertheless, the judge found the language “vague and overly broad” because it required that “all non-public information” be treated as confidential. We reverse the judge’s conclusion that the Respondent’s Code of Conduct is unlawful.

We agree with the judge that employees have a Section 7 right to discuss, for the purpose of mutual aid or protection, their terms and conditions of employment among themselves and with the public. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). However, we fail to see how the Code of Conduct affects that right. Paragraph 5 of the Code of Conduct does not mention employees’ terms and conditions of employment, much less restrict their discussion with anyone. Instead, it requires employees to maintain the confidentiality of “confidential information entrusted to them,” defined to include “all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed” and “information that suppliers and customers have entrusted to the Company.” Reasonably interpreted from “the perspective of an objectively reasonable employee who is ‘aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job,’”<sup>4</sup> paragraph 5 refers to information contained in the Respondent’s own confidential records or that the Respondent otherwise may lawfully conceal. See *Macy’s, Inc.*, 365 NLRB No. 116, slip op. at 4 (2017) (citing *International Business Machines Corp.*, 265 NLRB 638 (1982)). Indeed, the rule at issue here is substantively similar to the rule found lawful in *Macy’s*, which required employees to keep confidential “any information, which if known outside the Company could harm the Company or its business partners, customers or employees or allow someone to benefit from having this information before it is publicly known.” *Macy’s*, above, slip op. at 2–4; see also *LA Specialty Produce Co.*, above, slip op. at 3–4 (finding rule that requires employ-

<sup>4</sup> *Boeing*, above, slip op. at 3 fn. 14 (Member Kaplan) (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)).

ees to protect confidential and proprietary client/vendor lists lawful, citing *Macy's*, above). Accordingly, we reach the same result here.<sup>5</sup> We therefore reverse the judge's decision and dismiss this allegation.

We have found that paragraph 5 of the Code of Conduct is lawful because it does not, when reasonably interpreted, interfere with the exercise of Section 7 rights. Further, we designate rules that require employees to maintain the confidentiality of non-public information that, if disclosed outside the company, could harm the company or its customers or benefit its competitors as *Boeing* Category 1(a) rules that are lawful to maintain "because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights and therefore no balancing of rights and justifications is warranted." *Boeing*, above, slip op. at 5. However, to qualify for Category 1(a), such a rule must either (1) omit from coverage, expressly or implicitly, wages, salaries, and other terms or conditions of employment or, more generally, employee or personnel information, or (2), if it includes wage or salary information, make it clear that the information referred to is limited to data maintained and only accessible in the employer's confidential records.

### C. Amended Remedy

While the Respondent has not excepted to the judge's finding that the Confidentiality Agreement and Wurster Memo violate the Act, it has excepted to the judge's remedy and recommended order for these violations. The judge ordered the Respondent to rescind or revise the Confidentiality Agreement and Wurster Memo. The Respondent argues that its distribution of a revised Confidentiality Agreement without the accompanying Wurster Memo makes these remedies unnecessary. We agree in part, and we have revised the Order and notice to more accurately reflect the particular facts of this case.

To begin with, we find it unnecessary to order rescission of the Confidentiality Agreement. In most cases involving unlawful work rules, the rule is still in effect

when the Board issues its order; accordingly, in such cases the order requires the employer to rescind or revise the unlawful rule, and the remedial notice states that the employer *will* rescind or revise the rule. Here, however, on December 20, 2016, the Respondent distributed a revised Confidentiality Agreement that explicitly affirmed employees' right to discuss their terms and conditions of employment.<sup>6</sup> We find that by doing so, the Respondent replaced and effectively rescinded the Confidentiality Agreement. Accordingly, we have substituted a new notice to reflect that although the prior Confidentiality Agreement was unlawful, that Agreement has been rescinded. See *Lily Transportation Corp.*, 362 NLRB 406, 406–408 (2015).<sup>7</sup>

We will nevertheless order the rescission of the Wurster Memo. Although the Respondent did not distribute the Wurster Memo when it distributed the revised Confidentiality Agreement, it has not distributed a revised, lawful memorandum. Merely ceasing distribution of an unlawful work rule, without more, is insufficient to rescind the unlawful rule. As to the Wurster Memo, therefore, we will provide the standard remedy for maintenance of an unlawful rule and word the remedial notice accordingly.<sup>8</sup>

### AMENDED CONCLUSIONS OF LAW

Delete paragraph 2(a) and renumber the subsequent paragraphs of the judge's Conclusions of Law accordingly.

<sup>6</sup> The judge recognized that employees would not interpret the language of the revised Confidentiality Agreement to limit their Sec. 7 rights. Nevertheless, she found the revised Confidentiality Agreement unlawful because of the prior, unlawful Confidentiality Agreement. The General Counsel did not allege that the revised Confidentiality Agreement violates the Act. Therefore, we reject the judge's finding.

<sup>7</sup> *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), is distinguishable. There, we ordered the respondent to rescind its Mediation and Arbitration Agreement (M & AA), which unlawfully interfered with employees' right to file charges with the Board, notwithstanding its subsequent issuance of a Mutual Agreement to Arbitrate (MAA) that added language preserving that right. *Id.*, slip op. at 7. In that case, however, the M & AA specified an exclusive procedure for its revocation, and there was no evidence that this procedure was ever followed. *Id.* Moreover, the respondent in *Prime Healthcare* continued to insist on the legality of the M & AA. *Id.* Here, in contrast, the original Confidentiality Agreement did not specify any particular procedure for its revocation, and the Respondent does not except to the judge's finding that the original Agreement was unlawful.

<sup>8</sup> Because we have found that the Respondent failed to rescind the Wurster Memo for the reasons stated above, we do not reach the judge's finding that the Respondent failed to satisfy the requirements outlined in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978), and we do not pass on whether those requirements represent a proper standard for effective repudiation of unlawful conduct.

<sup>5</sup> In finding paragraph 5 of the Code of Conduct unlawful, the judge reasoned that the breadth of the language—requiring the confidentiality of "all" non-public information that could harm the Respondent—imposed on the Respondent a duty to "clarify" that "proscribed behavior does not include discussion" of terms and conditions of employment. We reject this circular reasoning. The Respondent need not clarify that it has not interfered with Sec. 7 rights where it has not interfered with Sec. 7 rights.

We also reject the judge's reliance on paragraph 6 of the Code of Conduct, entitled "Protection and Proper Use of Company Assets," to find the confidentiality provision in paragraph 5 unlawful. Paragraph 6 lists "salary information" as "proprietary information" whose "[u]nauthorized use or distribution . . . would violate Company policy." The lawfulness of paragraph 6 is not at issue in this matter, and accordingly, we do not rely upon it in determining the lawfulness of par. 5.

## ORDER

The National Labor Relations Board orders that the Respondent, National Indemnity Company, Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the provision in the Confidentiality Agreement that defines “confidential information” to include “personnel information.”

(b) Maintaining the memorandum accompanying the Confidentiality Agreement that contains the following language: “All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of . . . our employees,” and “[t]his Agreement will . . . protect our company against violation of a contract or disclosure of our own confidential information . . . or employees’ proprietary or private information.”

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the memorandum referred to in paragraph 1(b) above or revise it to remove any language that prohibits conduct protected by Section 7 of the Act.

(b) Notify all employees that the memorandum has been rescinded or, if it has been revised, provide them a copy of the revised memorandum.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide copies of the attached notice marked “Appendix.”<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 18, 2019

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

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William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

On December 20, 2016, we distributed to you a new Confidentiality Agreement. That new Confidentiality Agreement revised the previous Confidentiality Agreement to eliminate language designating “personnel information” as confidential. The National Labor Relations Board has now found that the language in the prior

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Confidentiality Agreement designating “personnel information” as confidential was unlawful.

WE WILL NOT maintain a provision in the Confidentiality Agreement that defines “confidential information” to include “personnel information.”

WE WILL NOT maintain a memorandum accompanying the Confidentiality Agreement that contains the following language: “All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of . . . our employees,” and “[t]his Agreement will . . . protect our company against violation of a contract or disclosure of our own confidential information . . . or employees’ proprietary or private information.”

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE HAVE rescinded the Confidentiality Agreement that contained the unlawful language, and we distributed a revised Confidentiality Agreement without the unlawful language on December 20, 2016.

WE WILL rescind the memorandum that accompanied the Confidentiality Agreement or revise it to remove the unlawful language.

NATIONAL INDEMNITY COMPANY

The Board’s decision can be found at [www.nlrb.gov/case/14-CA-182175](http://www.nlrb.gov/case/14-CA-182175) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



*Julie M. Covel, Esq.*, for the General Counsel.  
*Patrick J. Barrett, Esq.*, for the Respondent.

#### DECISION

##### STATEMENT OF THE CASE

ELIZABETH M. TAFE, Administrative Law Judge. This case was tried in Council Bluffs, Iowa on March 21, 2017. The hearing was adjourned until March 27, 2017, when I resumed the hearing by telephone conference and closed the record.

The Charging Party, Bruce Friedman, filed the charge on August 15, 2016,<sup>1</sup> the first amended charge on September 1, and the second amended charge on November 16. The General Counsel issued the complaint on November 30 alleging that the Respondent violated Section 8(a)(1) of the Act by maintaining certain confidentiality rules that discouraged and prohibited employees from discussing wages, hours, or other terms and conditions of employment.<sup>2</sup> The Respondent timely answered the complaint, admitting maintenance of the rules alleged, but denying all wrongdoing.

The parties were given a full opportunity to participate in the hearing, to introduce relevant evidence, to call, examine and cross-examine witnesses, and to file briefs. On the entire record,<sup>3</sup> and after considering the briefs filed by the Respondent and the General Counsel, I make the following findings, conclusions of law, and recommended remedy and order.

#### FINDINGS OF FACT

##### I. JURISDICTION

The Respondent, a corporation, sells property and casualty insurance policies at its facility in Omaha, Nebraska, where it annually receives insurance premiums valued in excess of \$500,000, of which at least \$50,000 represents premiums received from policyholders located outside the State of Nebraska. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

The Respondent, National Indemnity Company, is a property and casualty insurer with its principal place of business in Omaha, Nebraska. It is a wholly-owned subsidiary of Berkshire Hathaway Inc. (Berkshire), a publicly traded company. (Jt. Exh. 1). The parties stipulated that Berkshire is not a party to this case. (Jt. Exh. 1).

The parties stipulated that the relevant time period set forth in the complaint is February 15, 2016 through the filing of the complaint. (Jt. Exh. 1).

###### B. Respondent’s Confidentiality Rules

The complaint alleges that maintaining certain confidentiality rules violates Section 8(a)(1) of the Act, because the rules

<sup>1</sup> All dates are in 2016 unless otherwise indicated.

<sup>2</sup> On March 27, 2017, I granted the General Counsel’s unopposed motion to amend the complaint by withdrawing complaint paragraphs 4(a) and 4(b). I also granted the General Counsel’s motion to strike the partial testimony of Friedman over the Respondent’s objections, as it was incomplete and no longer material to the issues in the case. Accordingly, this decision does not address the substance of the withdrawn allegations. Although I allowed Counsel for the Respondent to make an offer of proof related to what Friedman’s testimony was expected to show as Counsel asserted a need to preserve an appeal right, in permitting the offer of proof, I have made no findings or conclusions regarding what, if anything, Friedman’s stricken testimony would have established.

<sup>3</sup> As a result of my granting the motion to strike the incomplete testimony of Friedman, the record contains no testimonial evidence.

have a tendency to discourage or prevent employees from discussing their wages, hours, and other terms and conditions of employment. The Respondent asserts that the rules do not violate the Act, and, moreover, that certain rules have been changed in a manner that clarifies their lawfulness.<sup>4</sup>

#### 1. Respondent's Code of Business Conduct and Ethics

Berkshire adopted a Code of Business Conduct and Ethics.<sup>5</sup> The Respondent has adopted a substantially similar Code of Business Conduct and Ethics (the Code of Conduct) (Jt. Exh. 2). The Respondent distributed its Code of Conduct to employees about January 1, 2016 by email, and placed it on its intranet. The 4-page Code of Conduct has not been revised since August 2015. (Jt. Exh. 1). The Code of Conduct defines "Covered Parties" to include the Respondent's "directors, officers, and employees." The Code of Conduct contains the following language at pages 2 to 3:<sup>6</sup>

#### 5. Confidentiality.

Covered Parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends.

#### 6. Protection and Proper Use of Company Assets.

All Covered Parties should endeavor to protect the Company's assets and ensure their efficient use. Theft, carelessness, and waste have a direct impact on the Company's profitability. Any suspected incident of fraud or theft should be immediately reported for investigation. The Company's equipment should not be used for non-Company business, though incidental personal use is permitted.

The obligation of Covered Parties to protect the Company's assets includes its proprietary information. Proprietary information includes intellectual property such as trade secrets, pa-

tents, trademarks, and copyrights, as well as business, marketing and service plans, engineering and manufacturing ideas, designs, databases, records, salary information and any unpublished financial data and reports. Unauthorized use or distribution of this information would violate Company policy. It could also be illegal and result in civil or criminal penalties.

#### 2. Respondent's Confidentiality Agreement

The Respondent's employees are required to sign a Confidentiality Agreement (Jt. Exh. 3). The Confidentiality Agreement was first communicated to all employees about July 21, 2009. All employees were required to sign the Confidentiality Agreement during the relevant time period (Jt. Exh. 1). The 1-page Confidentiality Agreement maintained during the relevant period defines "confidential information" to include "personnel information." It further requires employees to agree that they understand that violations of the Confidentiality Agreement could result in disciplinary action, including termination of employment, in addition to civil damages and penalties imposed by law. (Jt. Exh. 3)

The Respondent revised its Confidentiality Agreement on about December 20, 2016.<sup>7</sup> The Respondent distributed it to employees by email at the same time. (Jt. Exh. 1). The revised Confidentiality Agreement deleted the word "personnel" from its definition of "confidential information." (Jt. Exh. 4). It also included a new Paragraph 6 stating the following:

I understand that nothing in this Confidentiality Agreement prohibits or is designed to interfere with, restrain, or prevent employee communications regarding wages, benefits, hours, or other terms and conditions of employment. Employees have the right to engage in or refrain from engaging in such activities to the extent protected by law.

#### 3. Respondent's Memorandum Accompanying the Confidentiality Agreement

During the relevant time period, the Confidentiality Agreement (Jt. Exh. 3) was distributed to employees with a Memorandum (Jt. Exh. 5) dated July 21, 2009 from and signed by the Respondent's President, Donald Wurster (the Wurster Memo). Since December 20, 2016, the 1-page Wurster Memo has no longer been provided to employees. The Wurster Memo contains the following language:

In the course of our business, National Indemnity Company and our affiliates create and receive from others a variety of information in oral, written and electronic formats. We spend considerable resources on systems research and software development. We also develop other materials, such as underwriting manuals and business analyses which are of critical importance to our business. Our Human Resources department maintains information relating to our employees, such as evaluations, applications and insurance information. . . .

<sup>4</sup> The Respondent further argues that the rationale set forth in Chairman Miscimarra's dissenting opinion in *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 4-7, 9-10 (2017), which would overrule the standards set forth in *Lutheran Heritage*, below, should be applied here. See also *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7-24 (2016), Member Miscimarra, dissenting. However, I am obliged to apply the Board's majority position until or unless it is overruled by the Board or the Supreme Court.

<sup>5</sup> The Respondent represents that Berkshire adopted a Code of Business Conduct and Ethics to comply with Section 406 of the Sarbanes-Oxley Act, Pub.L. 107-204, 116 Stat 745 (2002). There is no showing on this record that the Respondent's compliance with provisions of the Sarbanes-Oxley Act conflicts in any way with its compliance with the NLRA.

<sup>6</sup> The General Counsel does not allege that paragraph 6 violates the Act.

<sup>7</sup> The updated confidentiality agreement is not alleged to violate the Act.

We regard the information we create and receive from others as confidential and endeavor to keep it protected from unauthorized disclosure. In certain instances this is required by law or contract. In other instances, the information is proprietary and its disclosure to others would harm our business interests.

As employees of National Indemnity Company, you may be required to access and use confidential information to perform your duties. All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of our company or our employees, insureds, claimants, agents or vendors. To ensure that this obligation is fulfilled, we undertake a number of actions to protect confidential information. . . .

. . . we are asking that every employee sign the attached Confidentiality Agreement. (Translation: You are required to sign it.) This Agreement will . . . protect our company against violation of a contract or disclosure of our own confidential information or our customers' or our employees' proprietary or private information.

#### 4. Respondent's Recently Revised Employee Handbook.

The Respondent's Employee Handbook was revised in about December 2016, and was distributed to employees by email and placed on the Respondent's Intranet on about December 20. (Jt. Exh. 1). Although not alleged to violate the Act, the revised Employee Handbook is included in the record as Joint Exhibit 6. The revised Employee Handbook (Jt. Exh. 6) is 22 pages long and states on page 6:

##### General Expectations

We seek to employ the most qualified people and recognize that our employees are professionals and adults. Each employee is expected to adhere to all of the Company's policies, procedures, and rules of conduct and ethics. Violations by an employee of any Company policies, procedures, or rules of conduct or ethics may result in discipline up to and including termination of employment.

Not every possible rule is included in the Employee Handbook or the Company Code of Business Conduct and Ethics. Other situations or behaviors may also result in discipline up to and including termination from employment. Each situation will be evaluated on a case-by-case basis. If you have any doubts or questions concerning permissible behavior, you are urged to discuss these matters with your supervisor, manager, department head or Human Resources. Nothing contained in this Handbook prohibits or is intended to prohibit employees from discussing their wages or other terms and conditions of employment. (emphasis in the original)

In addition to the Code of Conduct, the Handbook also refers to the required Confidentiality Agreement.

## ANALYSIS

### A. Legal Framework

An employer violates Section 8(a)(1) of the Act when it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7." *Id.* at 646 (emphasis in original). If the work rule does not explicitly restrict protected activities, it nonetheless will violate Section 8(a)(1) if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* at 647; see also *Rio All-Suites Hotel and Casino*, 362 NLRB No. 190 (2015). The mere maintenance of unlawful rules violates the Act without regard for whether the employer ever applied the rule for unlawful purposes. *Rio All-Suites Hotel & Casino*, above, slip op. at 9. Further, when employers require employees to adhere to employment "agreements" as a condition of employment, the Board construes the agreements as work rules and considers them under the same framework as other work rules. See, e.g., *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* mem. 255 Fed. Appx. 527 (D.C. Cir. 2007) and *Rio All-Suites Hotel*, above.

The confidentiality rules at issue here are not alleged to explicitly restrict protected activities or to have been promulgated in response to or applied to restrict Section 7 activities. Thus, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity, under the first prong of the *Lutheran Heritage* test, and therefore, whether the maintenance of the challenged rules is unlawful. In determining the lawfulness of rules, the Board must give the rules a reasonable reading and avoid improper presumption of unlawfulness; as such, work rules should be read in context and not in isolation. *Id.* at 646. *Rio All-Suites Hotel*, above. Ambiguity in a rule must be construed against the drafter, here, the Respondent. *Lafayette Park*, above at 825; *Rio All-Suites Hotel*, above.

When evaluating the lawfulness of confidentiality rules alleged to be overbroad, the Board specifically considers whether employees would reasonably construe the rules to restrict their Section 7 rights to discuss or disclose to other employees or the public information about their wages, hours, and other working conditions. *Fresh & Easy Neighborhood Market*, 361 NLRB 72, 73 (2014); *Lafayette Park*, above. The Board specifically considers whether employees would reasonably construe the confidentiality rules to restrict their Section 7 rights to discuss or disclose their wages, hours, or other conditions of employment. Compare *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (rule prohibiting employees from revealing information about other employees found unlawful) and *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92 (2016) (rule prohibiting disclosure of information considered proprietary by employer

or customers found lawful, where evidence did not establish that the rule could reasonably be construed to include employee information as proprietary information). An employer may lawfully require confidentiality in appropriate circumstances; however, the employer must attempt to minimize the impact of such a rule on protected activity. *Boeing Co.*, 362 NLRB No. 195, slip op. at 1 (2015). When the rule “fails to include accompanying language that would tend to restrict its application,” employees reasonably may construe that the protected activities are included in the prohibitions. *Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 and fn. 3.

#### B. Do the Challenged Rules Violate 8(a)(1)?

For the reasons discussed below, I find that the Respondent’s maintenance of the challenged confidentiality rules set forth in the Respondent’s Code of Conduct, its Confidentiality Agreement, and the Wurster Memo, whether read individually or as part of a comprehensive confidentiality policy, violate Section 8(a)(1) of the Act.

##### 1. Respondent’s Code of Conduct

The challenged provision in the Code of Conduct (paragraph 5, entitled “Confidentiality”) is vague and overly broad such that employees would reasonably assume it to encompass the protected activity of discussing or disclosing their wages, hours, and terms and conditions of employment. The provision requires that employees “must maintain the confidentiality of confidential information entrusted to them,” except when disclosure is authorized by Respondent’s legal officers or legally required. It defines “confidential information” to include “all non-public information that might be of use to competitors or harmful to the [Respondent] or its customers if disclosed” and to include “information that suppliers and customers have entrusted” to the Respondent. Although it does not mention employee information, the information is nonexclusive, and fails to clarify the meaning, or to minimize the effects on protected activity, such that employees would reasonably understand that the proscribed behavior does not include discussion or disclosure of wages, hours and other terms and conditions of employment. *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. 1-3 (2017); *Claremont Resort and Spa*, 344 NLRB 832, 836 (2005). Ambiguity in this overly broad rule is construed against the Respondent, so that employees are not put in the untenable position of having to guess whether engaging in protected activity would risk violating the overly broad work rules. *Lafayette Park*, above; *Rio All-Suites Hotel*, above.

Moreover, adjacent to this provision (paragraph 6, entitled *Protection and Proper Use of Company Assets*, the Code of Conduct provides a more detailed list of “proprietary information” the unauthorized disclosure of which would violate policy and could be illegal and result in civil or criminal penalties. This list, which is still nonexclusive, includes, inter alia, trade secrets, business, service and marketing plans, engineering and manufacturing ideas, designs, records, and unpublished financial data and reports; it also explicitly includes “salary information.” Alongside the overbroad confidentiality rule in paragraph 5 of the Code of Conduct, read in context, the warning that disclosure of salary information could result in pun-

ishment confirms my finding that employees would reasonably interpret the challenged confidentiality provision to limit their Section 7 right to discuss and disclose their wages. The Respondent’s use of the terms “private,” “confidential,” and “proprietary” overlap in other documents in the record, which further supports my conclusion that employees would have reason to fear that discussing protected terms and conditions of employment might lead to discipline or other negative consequences pursuant to this Code of Conduct.

##### 2. Respondent’s Confidentiality Agreement

Employees were required to sign and adhere to the Confidentiality Agreement (Jt. Exh. 3) from about July 2009 to at least December 20, 2016. Although the record establishes that this document is no longer distributed in the exactly the form of Joint Exhibit 3, it does not establish whether or to what extent it remains in effect. For example, the Confidentiality Agreement asserts that employees are bound by its rules indefinitely, and even after they have left the Respondent’s employment. The Confidentiality Agreement defined “confidential information” to include, inter alia, “personnel information.” It asserts that violating the rule could result in discipline, including termination, as well as civil damages and penalties imposed by law. This rule is overly broad, in that employees would reasonably construe it to include limitations on their right to discuss or disclose protected information about their wages, hours, and other terms and conditions of employment. Here too, ambiguity in the rule is construed against the Respondent as the drafter. *Lafayette Park*, above at 825; *Rio All-Suites Hotel*, above. In the absence of limiting language, a prohibition on disclosing “personnel information” “in any location or medium except for the advancement of the Company’s interests” and prohibiting the usage of “personnel information” for employee’s own benefit or for “the benefit of any person or entity except the Company” chills employees’ protected discussions and violates Section 8(a)(1).

On about December 20, the Respondent distributed a revised confidentiality agreement that no longer contains “personnel information” in the definition of confidential information. (Jt. Exh. 4) It also includes a “savings clause” stating that “...nothing in this [revised agreement] prohibits or is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms and conditions of employment. Employees have the right to engage in or refrain from engaging in such activities to the extent protected by law.” The General Counsel does not allege that this revised confidentiality agreement violates the Act. The Board generally does not view such a disclaimer as correcting an unlawfully overly broad rule. Here, if the revised agreement existed on its own, I would find that the detailed description of confidential information, none of which explicitly or impliedly includes wages, hours, and working conditions, and considering that the disclaimer language appears on the same 1-page document, would not cause employees to reasonably construe the agreement to limit their Section 7 rights. However, I note that the revised agreement does not expressly supersede or replace the challenged Confidentiality Agreement in a manner that would identify it to employees as containing substantive changes. Therefore, in



context, I cannot find that the revised agreement is lawful.

### 3. Memorandum Accompanying Confidentiality Agreement

The Wurster Memo is also overly broad, and violates Section 8(a)(1). Its description of the types of information the disclosure of which is prohibited is in non-exhaustive terms and includes a reference to information maintained by the Respondent's Human Resources department, "such as evaluations, applications, and insurance information." It uses the terms "confidential," "proprietary," and "private" somewhat interchangeably and without clarity about any purported differences in their meanings, which contributes to an employee's reasonable understanding that discussions or disclosure of protected information, such as wages and other terms and conditions of employment, would be proscribed and punishable offenses. *Lutheran Heritage*, above. Further, after expressly stating that employees are required to sign the confidentiality agreement, the Wurster Memo explains, "[T]his Agreement will help you understand your confidentiality obligations and protect our company against violation of a contract or disclosure of our own confidential information or our customers' or employees' proprietary or private information." These overly broad proscriptions would chill employees in engaging in protected activity, such as discussing or disclosing their terms of employment with other employees or the public.

### C. Has the Respondent cured unfair labor practices by revising some rules?

On December 20, 2016, the Respondent issued the revised confidentiality agreement and ceased distributing the Wurster Memo. The Respondent also distributed a revised Employee Handbook that contains a limitation in bold on page 6 of 22 under a section entitled "General Expectations" that "[n]othing in this Handbook prohibits or is intended to prohibit employees from discussing their wages or other terms and conditions of employment." The Handbook expressly replaces prior handbooks, but does not expressly replace all other written policies, such as the Code of Conduct or Confidentiality Agreement. The Respondent argues that these changes absolve it of any remedial obligation because it has cured any potential violations. I disagree.

The Board has long held that certain criteria must be met for the Respondent to show that its repudiation of unlawful conduct has been effective. The Respondent's acts to cure a violation must be (1) timely, (2) unambiguous, (3) specific to the unlawful conduct, and (4) taken in an environment free from other proscribed conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). See also, *DirectTV U.S. DirectTV Holdings LLC*, 362 NLRB No. 48 (2015), and *Rivers Casino*, 356 NLRB 1151, 1152 (2011). The Respondent must also provide sufficient publication such that employees are made aware of the repudiation and are assured that the Respondent will not continue to interfere with their Section 7 rights in the future. *Passavant*, above. I agree with the General Counsel that the Respondent has failed to meet its burden under *Passavant*. First, the repudiation was untimely, in that the rules at issue had been in effect for a substantial amount of time, the Confidentiality Agreement and Wurster Memo since at least July 2009, and the Respondent did not change them until after the com-

plaint issues in this case. See e.g., *Passavant*, above (repudiation untimely where it occurred 7 weeks after an unlawful threat), and *Fresh & Easy Neighborhood Market*, 361 NLRB at 75 fn. 3 (attempted repudiation untimely 2 years after violation and 10 days before issuance of complaint). Second, the Respondent failed to show that it either admitted any wrongdoing or explained to employees that the import of the changes, such that its actions cannot be construed as effective repudiation. See, e.g., *DirectTV U.S. DirectTV Holdings*, above (no repudiation found where employer failed to acknowledge unlawful conduct), and *Fresh & Easy Neighborhood Market*, above (same). Finally, there is no evidence that the Respondent actually publicized its purported repudiation to employees.

For all the above reasons, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in the complaint.

### CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has violated Section 8(a)(1) of the Act by maintaining work rules that discourage or prohibit employees from engaging in protected concerted activity, including discussing and/or disclosing their wages, hours, or other terms and conditions of employment:

(a) Maintaining the provision in Respondent's Code of Business Conduct and Ethics, entitled, "5. Confidentiality," that states, "Covered Parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends."

(b) Maintaining the provision in the Respondent's Confidentiality Agreement in effect through December 20, 2016 that defines "confidential information" to include "personnel information."

(c) Maintaining the memorandum accompanying the Confidentiality Agreement in effect through December 20, 2016 that contains the following language: "All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of . . . our employees . . ." and "This Agreement will . . . protect our company against violation of a contract or disclosure of our own confidential information . . . or our employees' proprietary or private information."

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent maintains unlawful written confidentiality rules, the Respondent is

required to revise or rescind the unlawful rules. This is the standard remedy to assure that employees may engage in protected activity without fear of being subjected to an unlawful rule. See *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), *enfd.* in relevant part 475 F.3d 369 (D.C. Cir. 2007). As stated there, the Respondent may comply with the order of rescission by reprinting the Code of Conduct and Ethics, the Confidentiality Agreement, and the memorandum accompanying the Confidentiality Agreement without the unlawful language or, in order to save the expense of reprinting the documents, it may supply its employees inserts stating that the unlawful rules have been rescinded or with lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until it republishes documents without the unlawful provisions. Any copies that include the unlawful rules must include the inserts before being distributed to employees. *Id.* at 812 fn. 8. See also *Hills & Dales General Hospital*, 360 NLRB 611, 613 (2014) and *Rio All-Suites Hotel*, 362 NLRB No. 190, slip op. at 6 (2015).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, National Indemnity Company, Omaha, Nebraska,, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Maintaining rules that discourage or prohibit employees from engaging in protected concerted activities including discussing and/or disclosing their wages, hours, or other terms and conditions of employment, and specifically, maintaining the following work rule provisions:

(i) The provision in Respondent's Code of Business Conduct and Ethics, entitled, "5. Confidentiality," that states, "Covered Parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends."

(ii) The provision in the Respondent's Confidentiality Agreement that defines "confidential information" to include "personnel information," which was in use through December 20, 2016.

(iii) The memorandum accompanying the Confidentiality Agreement that contains the following language: "All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of . . . our employees . . ." and "This Agree-

ment will . . . protect our company against violation of a contract or disclosure of our own confidential information . . . or our employees' proprietary or private information," which was in use through December 20, 2016.

(b) In any like or related manner interfering with, coercing, or restraining employees in the exercise of the rights guaranteed them by the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the work rule provisions set forth in paragraph 1(a), above, or revise them to remove any language that prohibits or reasonably may be read to prohibit conduct protected by Section 7 of the Act.

(b) Notify all employees that the above confidentiality rules have been rescinded or, if they have been revised, provide them a copy of the revised rules.

(c) Within 14 days after service by the Region, post at all of its facilities nationwide copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the notice, on forms provided by the Regional Director for Region 14 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C., November 20, 2017

#### APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

<sup>8</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>9</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain work rules that discourage or prohibit you from discussing or disclosing your wages, hours, or other terms and conditions of employment.

WE WILL NOT maintain the provision in our Code of Business Conduct and Ethics, entitled, “5. Confidentiality,” that states, “Covered Parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends.”

WE WILL NOT maintain the provision in the Respondent’s Confidentiality Agreement that defines “confidential information” to include “personnel information,” which was in use through December 20, 2016.

WE WILL NOT maintain the memorandum accompanying the Confidentiality Agreement that contains the following language: “All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of . . . our employees . . .” and “This Agreement will . . . protect our company against violation of a contract or disclosure of our own confidential information . . . or our employees’ proprietary or private information,” which was in use through December 20, 2016.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the provision in our Code of Business Conduct and Ethics, entitled, “5. Confidentiality,” that states, “Cov-

ered Parties must maintain the confidentiality of confidential information entrusted to them, except when disclosure is authorized by an appropriate legal officer of the Company or required by laws or regulations. Confidential information includes all non-public information that might be of use to competitors or harmful to the Company or its customers if disclosed. It also includes information that suppliers and customers have entrusted to the Company. The obligation to preserve confidential information continues even after employment ends.”

WE WILL rescind the provision in the Respondent’s Confidentiality Agreement that defines “confidential information” to include “personnel information.”

WE WILL rescind the memorandum accompanying the Confidentiality Agreement that contains the following language: “All of us have a common interest and obligation to assure that no one discloses in an unauthorized manner confidential information of . . . our employees . . .” and “This Agreement will . . . protect our company against violation of a contract or disclosure of our own confidential information . . . or our employees’ proprietary or private information.”

WE WILL notify all employees that the above rules have been rescinded or, if they have been revised, provide you a copy of the revised rules.

## NATIONAL INDEMNITY COMPANY

The Administrative Law Judge’s decision can be found at [www.nlrb.gov/case/14-CA-182175](http://www.nlrb.gov/case/14-CA-182175) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

